

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

[CORRECTED COPY]

77-1274

To be argued by
RICHARD J. WEISBERG

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1274

UNITED STATES OF AMERICA,

—v.—

JOSE ACOSTA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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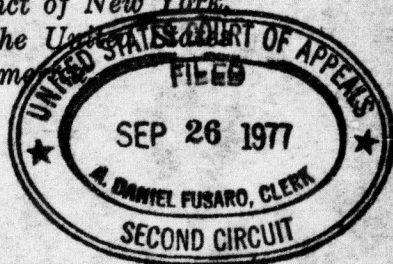


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1274

UNITED STATES OF AMERICA,

Appellee,

—V.—

JOSE ACOSTA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jose Acosta appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 16, 1977, following his plea of guilty before the Honorable Richard Owen, United States District Judge.

Indictment S 76 Cr. 1125 was filed on April 21, 1977, and charged Jose Acosta in one count with knowingly possessing, passing and attempting to pass counterfeit ten dollar Federal Reserve Notes, in violation of Title 18, United States Code, Section 472.*

Acosta moved to suppress counterfeit Federal Reserve Notes found on his person by officers of the White Plains

* This indictment superseded indictment 76 Cr. 1125, filed on December 14, 1976, which was subsequently dismissed by Judge Owen on June 6, 1977.

Police Department at the time of his arrest for participation in an attempted auto theft on October 22, 1976. In addition, Acosta sought to suppress his post-arrest statements. A hearing was held before Judge Owen on April 8, 1977, at the conclusion of which the District Court denied Acosta's motion in an oral opinion. Subsequently, on May 9, 1977, Acosta pleaded guilty, preserving the right to appeal the denial of his suppression motion.*

On June 16, 1977, Judge Owen sentenced Acosta as a youthful offender to an indeterminate term in the custody of the Attorney General for supervision and treatment, pursuant to Title 18, United States Code, Section 5010(b). Acosta is presently serving his sentence.

Statement of Facts

In his plea of guilty, Acosta admitted that on or about October 22, 1976, he had in his possession counterfeit money, and knowing that this money was counterfeit, nevertheless sought to pass it. (Tr. 9-10, 11).** The counterfeit currency was found on Acosta's person at the time of his arrest for auto theft by local police officers. Acosta's suppression motion asserted that the contraband and incriminating statements had been taken from his person pursuant to a warrantless arrest unsupported by probable cause. In view of the factual issues raised by defendant's motion, Judge Owen conducted a suppression hearing on April 8, 1977.

* The Government consented to Acosta's preservation of his right to appeal in accordance with procedures approved by this Court. See e.g., *United States v. Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

** "Tr." refers to the transcript of Acosta's plea allocution on May 9, 1977. "H." refers to the transcript of the suppression hearing held on April 8, 1977. References to defendant's Appendix are cited as "A", while "Br." refers to defendant's brief on this appeal.

A. The Suppression Hearing

On the morning of October 22, 1976, Jeffrey M. Horowitz, a communications craftsman, while at his place of work at 400 Hamilton Avenue, White Plains, New York, observed an unknown male breaking into a Volkswagen automobile in an adjoining lot about 350 feet from Horowitz' window vantage point. (H. 3-4).^{*} At this juncture, Horowitz, who was familiar with the physical appearance of the Volkswagen's owner, telephoned the White Plains Police Department ("WPPD") and advised them of what he believed to be an ongoing auto theft, and its location. (H. 4-5). Horowitz remained on the phone as he continued to observe the events below him. (H. 6).

Immediately after calling the police, Horowitz observed the individual who had broken into the Volkswagen, subsequently identified as a Mr. Rodriguez, step out and beckon in the direction of another parking lot to a second, but unseen individual. (H. 5-6, 15). After Rodriguez had ceased his beckoning signal, a police officer, Patrolman Taylor, arrived on the scene and commenced questioning Rodriguez. (H. 6,40). At this point Horowitz advised the desk officer that the police officer on the scene was interrogating the correct individual: the one that Horowitz had observed moments earlier breaking into the Volkswagen. (H. 6). In addition, Horowitz described to the desk officer Rodriguez' signal to the second individual. (H. 6-7).

^{*} The Volkswagen was parked in a lot adjoining both 400 Hamilton Avenue and Horowitz' residence at 40 Barker Avenue. (H. 3-4). Defendant's assertion that Horowitz testified that the ongoing larceny was occurring as much as 1,000 feet away from him reflects a misreading of the record. (Br. 4, 13). The reference to 1,000 feet was Horowitz' upper estimate of the distance between 400 Hamilton Avenue and 200 Hamilton, in the vicinity of which Acosta was later arrested. (H. 9-12).

George Lohse, the desk officer for the WPPD on the morning of October 22, 1976, received the communications from Horowitz. (H. 21-22). Lohse, who also testified at the suppression hearing, distinctly recalled that he had been advised by Horowitz of a larceny in progress involving *two* individuals and that he had broadcast that information to the WPPD field units. (H. 23, 25, 27, 31). Lohse's call was received by police officer Richard J. Smith, an eight year veteran of the WPPD, who was on patrol in a radio car at 9:30 that morning. (H. 39-40). Smith, who was approximately one block away, responded to the call. (H. 40).

Upon arriving at the scene he discovered that Officer Taylor already had Rodriguez in custody. (Id.) Smith also observed the green Volkswagen to which Rodriguez had sought entry with its vent window smashed, and both its hood and driver's door open. (H. 40-41). Taylor placed Rodriguez in the rear of Smith's car, while he, Taylor, entered 40 Barker Avenue in search of a complainant. (H. 40).

After placing Rodriguez under arrest and giving him *Miranda* warnings, Smith asked him whether he "was with anyone." Rodriguez responded "Yes, my friend." (H. 42). Smith further elicited that Rodriguez' "friend" was a male Puerto Rican; 22 years old; approximately 5' 9" tall with a medium afro; wearing a black shirt, grey trousers and a brown leather jacket; who, when last seen by Rodriguez was heading in the direction of 99 Church Street, a short distance away. (H. 36-37, 42-43). Upon receipt of this information Smith promptly transmitted it to Lohse, who in turn updated his initial broadcasts by transmitting the description and direction of travel of the second suspect to the remaining field units. (H. Tr. 23-24, 32-33, 35, 37, 43, 48).*

* Nothing in Lohse's testimony suggests that he instructed the field units that this second suspect was to be detained only for questioning, or investigation. (H. 20-38). In addition to Horowitz and Lohse, the Government called officers Richard J. Smith and Carl Bochterle as witnesses at the hearing. Defendant did not produce any witnesses on his own behalf.

In the meantime Officer Carl Bochterle, a ten year veteran of the WPPD, was on foot patrol about one block away from 99 Church Street. (H. 47-48). Bochterle had heard Lohse's initial broadcasts concerning a larceny at 40 Barker Avenue, but had not responded. (Id.). However, upon receipt of Lohse's subsequent transmission describing the "second subject that was *wanted* who fled the scene of a larceny" and who was heading in his direction, Bochterle positioned himself so as to be able to observe the backs of all the buildings on the 99 block of Church Street. (H. 48-49). (Emphasis added). Shortly thereafter Bochterle observed the defendant, Jose Acosta, who matched precisely the description just broadcast, emerge from between the backs of 95 and 99 Church Street. (H. 49). Bochterle repositioned himself in a manner to intercept Acosta and then "grabbed him", stating that he wanted:

"to speak to him about an alarm that was just given out, he matched the description of the subject that was *wanted for a larceny* a block or so before. I asked him for identification. He said he didn't have any and I called for a radio car stating I had the subject in custody that matched the description."

(H. 49-50). (Emphasis added).

Upon hearing Bochterle's transmission that he had apprehended the second suspect, Smith, with Rodriguez still in his vehicle, drove to the area of the arrest. (H. 43). When they arrived, Acosta was still present and Rodriguez, upon seeing his cohort said to Smith, "[t]hat's my friend, don't tell him that I ratted him out." (H. 44).

Acosta was thereafter driven to the WPPD's headquarters where a search of his person uncovered the counterfeit ten dollar Federal Reserve Notes which were the basis of this prosecution. (H. 50).

B. The District Court's Decision

In an oral opinion issued at the close of the suppression hearing, Judge Owen found:

1) That on the morning of October 22, 1976, a larceny was being committed on a Volkswagen, which was clearly observed by Horowitz;

2) that after achieving the break-in Rodriguez sought to summon a partner to the scene;

3) that Horowitz called the WPPD and reasonably advised them of the break-in and the involvement of two people, although he had seen only one;

4) that the WPPD broadcast an alarm of a larceny in progress involving two suspects;

5) that Rodriguez, the immediate perpetrator, clearly described the second suspect and the direction of his travel; and

6) that Bochterle was advised of the above over the police radio, and observing Acosta in the designated area, clearly fitting the description of the second suspect, then arrested him. (H. 67-70; A., Exhibit C).*

Specifically, Judge Owen concluded:

"Mr. Horowitz . . . reasonably calls the police and says there are two people involved in this

* In making his findings, Judge Owen emphasized the logically compelling connection between that which Horowitz observed and Rodriguez' post-arrest admissions:

"I think that you can deduce a great deal from what [Horowitz] saw about what the second person's participation was in this event. And then when the second person turns out to have the same description as your client and be in the vicinity and be going in the same direction that the co-conspirator says he was, I think that gives these police officers reasonable cause to pick him up." (H. 66).

even though he has only seen one and they broadcast a statement to the police officers, there are two people.

Having picked up that one person I find that Officer Smith, after reading his rights to Mr. Rodriguez, inquired of him whether he was with anyone and at that point got a very clear description of the other man and a statement of the direction that other man was going and Mr. Bochterle, hearing of this on his walkie talkie, positioned himself on the other side of the building toward which Mr. Rodriguez had pointed and thereupon saw Mr. Acosta coming through fitting that description very clearly, walked with him a distance parallel and then arrested him." (H. 69-70).

On the basis of the foregoing, Judge Owen held that Acosta's arrest was valid as a matter of law, since the WPPD had reasonable cause to believe that he was involved as a co-conspirator, or an aider and abettor in the attempted larceny of an automobile. Accordingly, the motion to suppress was denied. (H. 70; A., Exhibit C).

ARGUMENT

The District Court Properly Denied Appellant's Motion to Suppress.

Acosta argues that the WPPD lacked probable cause to arrest him—and, consequently to conduct the incidental search pursuant to which the counterfeit currency was seized—because the police officers' collective information was insufficient to lead a prudent man to conclude that Acosta had committed or was committing an offense. (Br. 10, 15). More particularly, defendant contends that

Rodriguez' statement to Smith that he, Rodriguez, was with a friend, did not implicate Acosta in the attempted auto theft. (Br. 12). Stretching the facts beyond credibility, Acosta seeks to buttress the foregoing by arguing that the police radio transmission sought him solely for questioning and not for arrest. (Br. 10, 11, 15-16). These contentions ignore the clear evidence in the record that supports the District Court's finding of probable cause and are utterly meritless.*

Acosta's contentions on this appeal ignore the settled principle that the soundness of Judge Owens' conclusions must be evaluated in the light most favorable to the Government, *United States v. Oates*, Dkt. No. 76-1100, slip op. 6389, 6392 (2d Cir. June 3, 1977), giving appropriate recognition to the fact that the district judge who conducts the suppression hearing is in a better position to evaluate the credibility of the testimony. *United States v. DeLeon*, Dkt. No. 77-1211, slip op. 5267, 5270 (2d Cir. Aug. 12, 1977).

The test of probable cause is:

"'whether, at the moment the arrest was made ... the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' *Beck v. Ohio*, 379 U.S. 89, 91 (1964)."

Adams v. Williams, 407 U.S. 143, 148 (1972). This test is viewed as a practical, nontechnical standard, affording

* Acosta does not dispute that the custodial search and seizure of the counterfeit money were proper if incident to a valid arrest. A search of the person incident to a lawful, warrantless arrest, conducted at the place of detention instead of the place of arrest, is of course valid. *United States v. Edwards*, 415 U.S. 800, 803-04 (1974). Cf. *United States v. Robinson*, 414 U.S. 218 (1973).

the best compromise to accomodate often opposing interests. *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750, 753 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976).*

A police officer may rely on broadcasts as a reasonably trustworthy source of information on which to premise an arrest. *Whitely v. Warden*, 401 U.S. 560, 568 (1971); *United States ex rel. Mungo v. LaVallee*, 522 F.2d 211, 214 (2d Cir. 1975), *vacated and remanded on other grounds*, 428 U.S. 907 (1976). *Klingler v. United States*, 409 F.2d 299, 303 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969). The assessment of probable cause for the arrest "is to be made on the basis of the collective knowledge of the police rather than on that of the arresting officer alone." *United States v. LaBelle, supra*, 517 F.2d at 753. *Accord, United States v. Canieso*, 470 F.2d 1224, 1230 n.7 (2d Cir. 1972); *White v. United States*, 448 F.2d 250, 254 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972). As this Court has recently recognized, while no single piece of information may support a finding of probable cause, consideration of all the information available to the police may justify a belief that a crime has been committed. *United States v. DeLeon, supra*, slip op. at 5270. Measured against these stand-

* In determining the validity of an arrest effected by local police, the Court must look to the applicable state law. *United States v. LaBelle*, 517 F.2d at 753. The law of the State of New York permits warrantless arrests where the arresting police officer has "reasonable cause" to believe that the suspect has committed a crime. N.Y. Crim. Proc. Law §140.10 (McKinney's 1971). Reasonable cause is the equivalent of the more familiar term "probable cause", which shall be used throughout the remainder of this brief. *United States ex rel. Gonzales v. Follette*, 397 F.2d 232, 234 (2d Cir. 1968). *United States ex rel. Eidenmüller v. Fay*, 240 F. Supp. 591, 592, 594 (S.D.N.Y. 1965), *cert. denied*, 384 U.S. 964 (1966).

ards it is clear that Acosta's arrest was supported by probable cause.

The facts available to the WPPD at the moment of Acosta's arrest plainly established the following: (1) The larceny of a motor vehicle had been attempted by Rodriguez; (2) during the course of this attempted larceny Rodriguez had beckoned to an unseen individual to join him; (3) upon his arrest Rodriguez stated that he was with a friend whom he described in detail and indicated was heading towards 99 Church Street; (4) shortly thereafter Acosta emerged from the rear of 99 Church Street; (5) Acosta matched the description given by Rodriguez; and (6) Acosta claimed to lack any identification.*

These facts, viewed collectively, logically afforded the WPPD a reasonable basis to believe that the larceny attempt involved two persons and that Acosta was the second suspect. Indeed, similar fact patterns consistently have been viewed by the courts to constitute probable cause for an arrest, rather than mere suspicion sufficient to justify only an investigatory stop. *United States v. Skinner*, 412 F.2d 98, 101-02 (8th Cir.), cert. denied, 396 U.S. 967 (1969); *United States v. Fay*, supra, 240 F. Supp. at 595. See, *United States ex rel. Hollman v. Rundle*, 461 F.2d 758, 759 (3d Cir. 1972). Judge Owen's decision thus conformed to the conventional wisdom of

* Since Horowitz was not an informant, there was no requirement to show that he had previously been reliable. The same rule applies to Rodriguez who was a participant in the very crime under investigation. *United States v. Jackson*, Dkt. Nos. 76-1564-66, slip op. 4805, 4824 (2d Cir. July 19, 1977); *United States v. DiStefano*, Dkt. Nos. 76-1581, 1582, slip op. 3539, 3548 (2d Cir. May 16, 1977); *United States v. Rueda*, 549 F.2d 865 (2d Cir. 1977); *United States v. Miley*, 513 F.2d 1191, 1204 (2d Cir.), cert. denied, 428 U.S. 842 (1975).

these and similar cases that there is probable cause to arrest a person who matches a detailed description of a suspected felon and who is found in the limited geographic area where the suspect is reported to be located.

Acosta seeks to avoid the obvious conclusion of probable cause by arguing that Rodriguez' statement that he was with a "friend", in response to Officer Smith's post-arrest inquiry, was insufficient to implicate Acosta in the attempted larceny. "In dealing with probable cause, however, as the very name implies, [courts] deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar v. United States*, 338 U.S. 160, 175 (1949)." *Adams v. Williams*, *supra*, 407 U.S. at 149. Defendant's argument runs afoul of this admonition.

Clearly, a police officer's question to an arrestee, apprehended in the course of a felony, concerning whether he was with anybody, is not an inquiry as to the quality of the arrestee's social life, but rather a pointed attempt to determine the existence and whereabouts of accomplices. In such a context, the arrestee's reply that he was "with a friend," realistically can only be construed to mean that an accomplice is still at large. In this case, the investigating officers' conclusion to this effect was buttressed by their prior independent knowledge—supplied by Horowitz—that during the course of the larceny Rodriguez had beckoned to an unseen individual. Furthermore, Rodriguez' intent to identify Acosta as his accomplice—and the reasonableness of the police officers' interpretation of this statement—were made unmistakable by Rodriguez' subsequent entreaty to Smith, after Acosta's arrest, that Acosta not be told that he, Rodriguez had "ratted him out". (H. 44). Indeed, as Judge Owen specifically found, in the context of Rodriguez' interrogation the only rational and reasonable conclusion

to be drawn was that he had specifically implicated and identified an accomplice.*

Finally, Acosta argues that the alleged absence of probable cause was tacitly acknowledged by the WPPD's radio broadcasts which sought Acosta solely for questioning and not for arrest. This argument is meritless, both as a matter of fact and law.

Officer Bochterle testified consistently on three occasions that the broadcast on which he based the arrest of Acosta simply stated that Acosta was *wanted* in connection with a larceny that had just transpired. (H. 48, 49-50, 53). Subsequently, however, he stated that the broadcasts sought Acosta for questioning. (H. 53). When Acosta's counsel immediately asked Bochterle whether the police broadcasts had directed that Acosta be arrested, or merely questioned, he responded that no specific direction had been given, and confirmed that the relevant broadcasts simply had stated that Acosta was "wanted" in connection with a larceny. (H. 54). This is fully supported by Officer Lohse, whose testimony is barren of even the slightest suggestion that he broadcast a direction to detain Acosta merely for questioning (H. 20-38).

Thus, it is evident that Bochterle's use of the word "questioning" was merely a momentary, semantic inadvertence by one not trained in the technical refinements of the law. The record evidence makes abundantly clear that the WPPD broadcasts in question simply advised field units that appellant was wanted in connection with

* It is arguable that Rodriguez' statement to Smith that he had "ratted out" Acosta, may be considered as affirmative evidence of the probable cause to arrest Acosta. This Court, however, need not reach this issue since, at a minimum, as Judge Owen found, this statement by Rodriguez clearly confirmed his earlier intent to identify Acosta as his accomplice and the reasonableness of Smith's interpretation to that effect.

a larceny that had just occurred, and there was no credible basis for the trial court to have found otherwise.

Moreover, the determination of the existence of probable cause is based on an entirely objective standard. Thus, it is settled that the subjective views of the police, including a belief that they lacked probable cause for an arrest, are irrelevant, and not binding on the courts. In each case the courts must evaluate the objective facts available to the arresting agency and determine *de novo* the existence or lack of probable cause. *E.g.*, *United States v. Oates*, *supra* (2d Cir. June 3, 1977) slip op. at 6410-11; *United States v. LaBelle*, *supra*, 517 F.2d at 754-55; *United States v. Vital-Padilla*, 500 F.2d 641, 644 (9th Cir. 1974); *United States v. Jenkins*, 496 F.2d 57, 72-73 (2d Cir. 1974); *cert. denied*, 420 U.S. 925 (1975); *Guzman v. Estelle*, 493 F.2d 532, 536 n.13 (5th Cir. 1974); *United States v. Tramontana*, 460 F.2d 464, 466-67 (2d Cir. 1972); *United States v. Skinner*, *supra*, 412 F.2d at 102; *United States v. Klingler*, *supra*, 409 F.2d at 304-05.* Thus, since the facts clearly supported a finding of probable cause at the moment of Acosta's arrest, the arrest was valid even if Bochterle believed his mission was solely to detain defendant for questioning.**

* See also *United States v. Raymond Ricard*, Dkt. No. 77-1109, slip op. (2d Cir., September 16, 1977) where this Court sustained a warrantless search on the grounds that at the time of the search the police officer who conducted it had probable cause to make an arrest which he chose not to effect.

** The fact that Acosta was not prosecuted for attempted auto theft by local authorities is of no consequence. There is no record evidence indicating why the local prosecutors chose not to try Acosta for this crime. Accordingly, it is inferable that prosecution was withheld for any number of reasons having nothing to do with the strength or weaknesses of the local case, including the essential duplication of local and federal effort that such a prosecution would have represented. In any event, the subsequent failure to prosecute Acosta in no way vitiates the showing of probable cause at the time of his arrest, and is simply irrelevant.

In sum, the record evidence, viewed in a light most favorable to the Government, amply supports Judge Owen's determination that the contraband and statements were seized from Acosta incident to a valid arrest supported by probable cause. Acosta's suppression motion, therefore, was properly denied.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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County of New York)

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